

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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| |) | D.T.E. 02-24 |
| Fitchburg Gas and Electric Light Company |) | D.T.E. 02-25 |
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**THE ATTORNEY GENERAL’S OBJECTION TO FITCHBURG’S MOTION TO
ADMIT POST-HEARING EVIDENCE RELATED TO URT-2002 FUNDING AND
MOTION TO STRIKE PORTIONS OF THE COMPANY’S INITIAL BRIEF**

The Attorney General objects to the Motion to Admit Post-Hearing Evidence related to URT-2002 Funding, filed October 9, 2002 (“Motion”) of Fitchburg Gas and Electric Company (“Fitchburg” or the “Company”) by which the Company seeks to admit into evidence the Certificate of Sandra L. Whitney dated October 7, 2002 (“Certificate”). Pursuant to Mass.R.Civ.P. 12 and 220 C.M.R. §§ 1.04(5) and 1.11(7) and (8), the Attorney General also requests that the Department of Telecommunications and Energy (“Department”) strike the relevant portions of the Company’s Initial Brief which reference extra-record evidence and testimony contained in the Certificate and elsewhere in the Company’s Initial Brief as discussed below. The extra-record evidence and testimony sought to be struck are:

- The information contained in the URT 2002 Certificate of the Company’s Board of Directors vote of December 31, 2001 (Exh. FGE-URT) and corresponding portions in the brief;¹ and
- The information contained in footnotes 9, 10, and 11, the first full sentence on page 21, and subpart 1 on page 23 of the Company’s Initial Brief regarding the Sawyer Passway

¹ The entire paragraph that should be struck is as follows: “The Attorney General has not requested substantiation of the 2002 URT funding level, but raises this issue for the first time on brief. FG&E’s 2002 cash contribution to the URT is known and measurable. See Exh. FGE-URT Board Vote.” FGE IBr., p. 65.

Substation.² (FGE IBr., pp. 19-23).

I. INTRODUCTION

In its Initial Brief, the Company included several extra-record statements that the Company appears to intend to submit as evidence in this case. These extra-record submissions, absent the required prior motion to reopen the record, violate Department Regulations and precedent and prejudice the rights of other parties. 220 CMR 1.11(8); *Boston Gas Company*, D.P.U. 88-67 (Phase 2), p.7 (1989). The Company thus continues an unfortunate pattern: in Fitchburg's last request for a general rate increase, the Department criticized as "maladroit at best" the Company's attempt to add to rate base on the final days of hearings through a record response on an unrelated issue. The Department denied the request, noting that there was "no opportunity to conduct discovery on this proposed addition or to cross examine the Company" *Fitchburg Gas and Electric Light Company*, D.T.E. 98-51, p. 9 (1998). The Company has failed to move for, much less show good cause for seeking to include this information at this late date. This information fails to meet the Department's standards for inclusion as post-hearing evidence. The Department should grant the Motion To Strike the information and all references in the briefs to this information.

A. URT 2002 Board Vote

On October 9, 2002, Fitchburg filed its Motion and Certificate concerning the authorization of \$537,700 in Company funds to the Unitil Retiree Trust ("URT") for the calendar

² "FG&E's customers are equally responsible for removing the encasement, concrete, bricks and mortar, and until that costly process is completed, which is proceeding as expeditiously as possible, the plant is deemed by FG&E to be in service and is not retired." FGE IBr., p. 21.

year 2002.³ Fitchburg seeks to reopen the record in order to present evidence on the authorization of funds to the URT as part of the Company's pro forma adjustment to its post-employment benefits other than pensions ("PBOPs") operations and expense portion of its rate case. FGE IBr., p. 65. The Company seeks to include this information as means to demonstrate that the Company's 2002 cash contribution to the URT is known and measurable and should be included as a PBOP expense. *Id.* In support of its Motion, Fitchburg contends that the Attorney General did not request substantiation of the 2002 URT funding level and raised the issue of the URT cash contributions for the first time in his Initial Brief after the close of hearings. Fitchburg Initial Brief, p. 65.

B. Sawyer Passway Substation

The Company also included additional information in Footnotes 9, 10, and 11, and on page 21 of the Company's Initial Brief regarding the depreciation and alleged removal costs associated with the substation. FGE IBr., pp. 19-23.

II. STANDARD OF REVIEW

The Department's rules provide that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). The Department has made clear that, except for updates of routine information already provided on the record, *e.g.*, property tax bills, a motion to reopen must be filed and granted **before** the testimony or exhibits are "thrust upon the trier of

³ The Attorney General notes that the Certificate filed with the Department is styled as an affidavit but is actually an unsworn statement signed by the Company's attorneys and clerk. The Company's failure to provide the certificate in proper affidavit form should cause the Department to reject summarily Fitchburg's Motion.

fact,” noting that “one cannot un-ring a bell.” *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989).

In the URT instance where a motion to reopen has been filed, good cause has been defined as a showing that the proponent has previously unknown or undisclosed information on a material issue that would be likely to have a significant impact on the decision already rendered. *Machise v. New England Telephone and Telegraph Company*, D.P.U. 87-AD-12-B at 4-7 (1990); *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989); *Tennessee Gas Pipeline Company*, D.P.U. 85-207-A at 11-12 (1986).⁴

Department precedent requires rejection of new arguments and testimony in a party’s briefs. Department precedent establishes that the proper procedure is to “strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence.” *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach of “[striking] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case.” *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), citing *Service Publications Inc. v. Goverman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

⁴ Department “case law on late-filed exhibits is based upon the premise that late-filed exhibits are prejudicial because other parties do not have the opportunity to conduct cross-examination regarding information contained in late-filed exhibits in order to test the accuracy of the data through the litigation process.” *Fitchburg Gas and Electric Light Company*, D.T.E. 98-51, p. 9 (1998); *New England Telephone and Telegraph Company*, d/b/a/ NYNEX, D.P.U. 94-50 at 62 (1995). Hence, only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into evidence following the close of evidentiary hearings. See *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination).

Moreover, state administrative law requires that parties be given an opportunity to cross examine witnesses and present rebuttal evidence. G.L. c. 30A, § 11(3).

III. ARGUMENT

1. The Unsworn Extra-Record Evidence And Testimony Contained In The URT 2002 Certificate Is Not Extraordinary, New, Nor Previously Unknown.

The unsworn Certificate which Fitchburg seeks to have admitted into record evidence contains extra-record evidence and testimony that does not constitute extraordinary information. The Company has not established that there is new evidence concerning the authorization of cash contributions to the Company's PBOP URT that has come to light or that there is new evidence that was not known to it when the record was still open. Indeed, the Certificate clearly states that the vote of the Board of Directors was held December 31, 2001, over eight months before the close of hearings. The Company has the burden of establishing the propriety of cash contributions as a PBOP expense and was well aware of its burden at time of filing its rate case and conduction hearings.

In *Petition of Cambridge Electric Light Company*, D.P.U. 92-15, p. 2 (1992), the Department found good cause to admit certain evidence subsequent to the close of the hearings, noting that "the evidence sought to be introduced by Cambridge Electric [was] in the nature of new information obtained after the close of hearings and provide[d] current information on the Company's operations." The evidence that Fitchburg seeks to introduce does not involve current operations but rather historical information that could have been provided during the hearings and subjected to cross examination. Information concerning the Board of Directors' vote regarding PBOP contributions was clearly known before May 17, 2002, the time this rate

case was filed. Therefore, the Department should deny Fitchburg's Motion.

2. The Company Fails To Meet The Department's Standard Regarding the Sawyer Passway Substation

In footnotes 9, 10, and 11 of the Company's Initial Brief, and in text at page 21, the Company attempts to include information regarding the Sawyer Passway Substation that was not presented at trial, bears no citation reference to the record, and is not included in a motion to admit post-hearing evidence. Footnote Nine attempts to change the record on test year depreciation expense for the substation. Footnote Ten includes estimates of the alleged cost of removal. Footnote Eleven, the first full sentence on page 21, and subpart (1) on page 23 also refer to the estimated cost of removal. None of this information was presented at or before trial or in response to a record request. The Company has failed to follow proper Departmental procedure which requires showing filing a Motion To Reopen with a showing of good cause to admit post-hearing evidence and to reopen the record through a motion. 220 CMR § 1.11(7), (8); *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989).

3. The Department Should Strike The Relevant Offending Portions Of The Company's Initial Brief.

The Attorney General requests that the Department strike: (1) last paragraph on page 65, Part V, Section C, Subsection 2(g) (entitled "Post-employment Benefits Other Than Pension ['PBOP'] [Common]); (2) Footnotes 9, 10, and 11, the first full sentence of Page 21, and the subpart (1) on Page 23 of the Company's Initial Brief because it cites, references or otherwise relies upon extra-record evidence and testimony. Numerous statements contained in the Certificate, Footnotes 9, 10, 11, and text on Pages 21 and 23 are not supported by the record. *See* Attorney General's Initial Brief, pp. 35-36. Allowing Fitchburg to cite, reference or otherwise

rely upon extra-record evidence and testimony that the Attorney General had no opportunity to cross-examine violates the Attorney General's due process rights and the Department rules and precedent. *See MediaOne/New England Telephone*, D.T.E. 99-42/43, p. 17-18 (1999); *Boston Edison Company*, D.P.U. 90-335, p. 7-8 (1992); *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991); *see also* G.L. c. 30A, § 11; and 220 C.M.R. §§ 1.11(4), 1.11(7); and 1.11(8). Accordingly, the relevant offending portion of the Company's Initial Brief should be stricken from the record. *See Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980).

4. Fitchburg Was Put On Notice Of The Issue Of PBOP Pro Forma Adjustments

Throughout this proceeding, Fitchburg was on notice that any adjustment to PBOP O&M expense was an issue in this case. Department precedent holds that "the filing of a general rate case places a company on notice that every element of the rate request is at issue." *Boston Gas Company*, D.P.U. 96-50-C (Phase I), p. 46 (1997) *citing* *Bay State Gas Company*, D.P.U. 1535-A at 17 (1983). Additionally, the Company's contention that the Attorney General raised the issue of the substantiation of the URT 2002 PBOP expense for the first time in his Initial Brief after the close of hearings lacks merit. The Attorney General asked questions regarding the Company's proposed adjustments to its PBOP expense during the discovery phase of this case and during hearings, and those inquiries together with the related responses were all entered as exhibits in this case:

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| AG-7-62 | Asking for FAS 106 contributions for the past five years |
| AG-1-48 | Asking for all actuarial reports for pensions and PBOPs |
| AG-1-49 | Asking for all expenses in O&M, including all cash contribution |

amounts paid to the Company's retirement trust fund.

The Attorney General also cross-examined the Company's witness regarding cash contributions to the URT regarding these issues. *See* Tr. 12. pp. 1511-1512; *see also Boston Gas Company*, D.P.U. 96-50-C (Phase I) at 46.

IV. Conclusion

Accordingly, the Department should deny Fitchburg's Motion and strike the aforementioned and related portions of the Company's Initial Brief which reference extra-record evidence and testimony.

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